

Siskind's Immigration Bulletin
February 14, 2003

E-mail subscribers as of 10 October 2001: 30,159 persons (50 states/144 countries).
Published by Greg Siskind, partner at the Immigration Law Offices of Siskind, Susser,
Haas & Devine, Attorneys at Law; telephone: 800-748-3819, 901-737-3194 or 615-
345-0225; facsimile: 800-684-1267, email: gsiskind@visalaw.com, WWW home
page: <http://www.visalaw.com>.

SSHD serves immigration clients throughout the world from its offices in the US,
Canada and the People's Republic of China. To schedule a telephone or in-person
consultation with the firm, go to <http://www.visalaw.com/intake.html>. Editors: Amy
Ballentine and Greg Siskind. Contributors: Karen Weinstock, David Delgado and Mick
Wright.

To receive a free e-mail subscription to Siskind's Immigration Bulletin, fill out the
form at <http://www.visalaw.com/subscribe2.html>. To unsubscribe, send your request
to visalaw-unsubscribe@topica.com.

To subscribe to the free Siskind's Immigration Professional Newsletter, go to
<http://www.visalaw.com/sip-intro.html>.

Are you a jobseeker looking for an employer to sponsor your work visa?
Are you an employer or recruiter who can benefit from free online job posting?
Visit [Visajobs.com](http://www.visajobs.com), the online career network, and create your new account
(<http://www.visajobs.com>).

1. Openers
2. The ABC's Of Immigration – Visa Options For Nurses, Part II
3. Ask Visalaw.com
4. Border News
5. News From The Courts
6. Government Processing Times
7. News Bytes
8. International Roundup
9. INS' New Statistical Yearbook Shows Latest Trends in Immigration
10. INS Assures Public All Services Will Continue After New Agency Takes Over
11. Texas Attorney General Targets "Notarios"
12. State Department Visa Bulletin for March 2003
13. Another Consular Officer Guilty of Visa Fraud
14. American Immigration Lawyers Association Submits Comments on New HHS
J-1 Physician Waiver Program
15. Guest Article: United States Taxation of Resident and Nonresident Aliens –
Part I: Resident or Nonresident Individuals
16. Legislative Update

Dear Readers:

The chaos continues for the nation's immigration lawyers and, of course, their clients. We are getting ready to go into the next round of Special Registration. The INS is in its final month of life and we still do not have a clear picture of the new immigration system to be administered by the Department of Homeland Security. Security checks are still causing enormous delays for many visa applicants. And, of course, we have a looming war and warnings of terrorist attacks which could have an enormous impact on the immigration system. Which US consulates will close? Will airport inspection procedures change? And what about the threats? The 9/11 attacks have dramatically changed the immigration system. Would another attack at the hands of foreign nationals result in an extreme anti-immigrant backlash?

At the very beginning of my legal career I practice corporate law and was ready to quit due to boredom. I felt like the practice was largely repetitive and the issues were not particularly compelling. Then I found immigration law. I told friends at the time that I liked the fact that every week changes came in the immigration system that affected my cases. And that makes the practice more interesting and challenging. That is more the case today than it ever has been.

This week there is quite a variety of news. There are new scandals at the immigration agencies. A consular official in Prague pled guilty to fraudulently issuing visas. And in Alberta, an INS official was deported back to the US for a form of corruption that is the first for which we have ever reported. The official worked at the Calgary Airport and was paid off by one company to delay the entrances of that company's competitor's employees. One of the company's affected actually went out of business because its employees could not get to the US to service its American customers.

I also am including the full text of the American Immigration Lawyers Association's comment on the new J-1 waiver program for physicians that is being sponsored by the US Department of Health and Human Services. I co-wrote this comment along with J-1 waiver gurus Robert Aronson and Bob Deasy.

We also include this week the first of what we hope will be many articles from tax lawyer Stephen Weiser in Denver. Stephen concentrates on tax issues for international clients and we believe he will have a lot of useful information to impart to our readers.

In firm news, I was interviewed for the latest issue of the Memphis Business Journal regarding various changes in nurse visa procedures. To read the article, you can go to <http://www.visalaw.com/news>. There you will also see a recent interview with me on Slate.com, the popular online news site as well as several other articles published in the last several weeks.

By the way, we hope you like the look of this week's issue. We are now publishing the newsletter in two formats - formatted HTML and plain text. If you are receiving this week's issue in HTML we hope you find the format more attractive and readable. If you are getting this in text and want to switch to HTML, you can click on the link at the bottom of this email or go to www.topica.com and log into your subscription page for our newsletter to change your format preference.

As always, we remind readers that we're lawyers who make our living representing immigration clients. We would love to discuss becoming your law firm. Just go to <http://www.visalaw.com/intake.html> to request an appointment or call us at 800-748-3819 or 901-682-6455.

Regards,

Greg Siskind

2. THE ABC'S OF IMMIGRATION – VISA OPTIONS FOR NURSES, PART II

The following is the second of a two-part article on immigration for registered nurses. The article was authored by Kristi Crawford, partner in SSHD's Raleigh-Durham office, Cynthia Ryan, partner in SSHD's New York City office, Karen Weinstock, partner in SSHD's Atlanta office and Greg Siskind, partner in the firm's Memphis headquarters.

Immigrant Visas for Nurses

The immigrant visa is normally the only option for nurses because most of the non-immigrant visa classifications are not available to the typical registered nurse seeking employment in the United States.

Employment-based immigrant visas typically involve three main steps. First, the employer files a Labor Certification application with the U.S. Department of Labor. The purpose of the application is to test the employer's local labor market for available workers. If no qualified and available workers are located, the position is certified as open for a foreign worker.

Second, the employer files an I-140 Alien Worker Petition with the Immigration & Naturalization Service. The purpose of this petition is to verify that the foreign worker has the minimum requirements to fill the open position, and serves to classify the foreign person as eligible for a particular visa category.

Third, on the basis of the Labor Certification and Alien Worker Petition, the foreign worker makes an application for an immigrant visa at a U.S. Consulate. If the foreign worker is legally present in the U.S., he or she may instead apply for permanent resident status via a process called adjustment of status. A nurse in the US can simultaneously apply for the I-140 and for adjustment of status.

Pre-Certification for Nurses

As noted above, most employment immigration cases require the employer to first recruit and test the labor market for qualified citizens or permanent residents. After this test is complete, the Department of Labor will certify that no qualified, American worker is immediately available to fill the position. Only then will the employer be able to sponsor a foreign worker. While these labor certifications are often successful, they can be time intensive and do not reflect the immediate needs of the business world.

In 1996, Congress passed legislation that retained nurses on a very short list of pre-certified occupations for which a labor shortage was recognized. The list is included in Schedule A of the labor certification regulations and these types of green card cases are called "Schedule A labor certifications". The Department of Labor (DOL) has already determined that there are not enough American workers who are able, willing, qualified, and available to fill all of the openings for professional nurses. Therefore, no test of the labor market is required and the case can be directly filed with the Immigration and Naturalization Service. This does not necessarily mean that all cases are approvable or will be handled quickly. The importance of nursing being pre-certified is that it skips the first and most time consuming part of the employment based immigration process.

It is important to note that this pre-certification is limited in scope. It only applies to "professional nurses". It is not available to Licensed Practical Nurses, Nurse Assistants, or other nursing aides. Professional Nursing is defined as course of study in professional nursing resulting in a diploma, certificate, baccalaureate degree, or associate degree. More specifically, an acceptable course of study for professional nurses generally includes theory and practice in clinical areas such as obstetrics, surgery, pediatrics, psychiatry, and medicine. Whatever training the nurse has received should result in licensure in the country in which the training occurred. This coursework may have been completed at a U.S. nursing school or an approved foreign nursing program. For an immigrant visa, it is not required that a nurse have a bachelor's degree in nursing, only that he or she completed a professional program in nursing and have subsequently been licensed.

Filing the I-140

The initial step in a Schedule A case is to file a Form I-140 application package to the appropriate supporting documentation to the appropriate I.N.S. service center. There are four regional I.N.S. service centers. They are located in Vermont, Texas, Nebraska, and California and each service center has jurisdiction over a section of the country. A case is properly filed in the service center having jurisdiction over the place of employment or in the service center covering the region where the employer's office is located. This is an important distinction because service centers have varying processing times. This may account for varying experiences in the HR industry as to how long it is taking to obtain the approval necessary before the nurse can apply for consular processing or adjustment of status.

Supporting documentation must be submitted with the I-140 as prescribed in 20 C.F.R. 656.22(c)(2). This supporting evidence includes the following:

1. ETA Form 750 Parts A and B, in duplicate (these are the labor certification forms);
2. A posted notice of the job opening. This notice must include a job description, work hours, and rate of pay. The notice must be posted in the worksite for a minimum of ten business days;
3. Evidence that the petitioning employer has the financial ability to pay the salary offered to the nurse. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. If the U.S. employer employs 100 or more workers, the INS may accept a statement from a financial officer of the organization;

4. CGFNS certificate or nurse license from state where the nurse will be working or proof of passing the NCLEX licensing exam and evidence that the nurse cannot obtain a license because he or she cannot obtain a social security number.
5. Nursing diploma or degree;
6. Nursing registration/licensure from the country where the degree was obtained.

A CGFNS certificate is evidence that the nurse has complied with a three step review of their nursing skills: 1. a credentials evaluation; 2. passage of an English language proficiency exam; and 3. passage of the CGFNS qualifying exam. Once these requisites have been met, the Commission on Graduates of Foreign Nursing Schools will issue the nurse a CGFNS certificate. The purpose of this certification program is to serve as a predictive evaluation process to accurately judge which nurses will be able to meet the requirements for U.S. licensure once admitted to the country. If the nurse has already passed the NCLEX- RN exam, they are exempted from the requirement of obtaining a CGFNS certificate.

The Visa Screen Certificate

The Immigration & Nationality Act controls the admission and presence of aliens in the United States. I.N.A. Section 212(a)(5)(C) sets out the guidelines by which foreign health care workers may gain admission. This law names the Commission on Graduates of Foreign Nursing Schools as an agency authorized to issue the document, referred to as VisaScreen. The CGFNS is the only agency designated to administrate the VisaScreen certification program. The fee per applicant is currently 5. One should contact the CGFNS directly for application instructions. The VisaScreen certificate is required in addition to the CGFNS certificate.

Issuance of the VisaScreen certificate is an indication that the nurse has met all of the requirements of the Commission. The requirements before the certificate can be issued are as follows:

- (i) The alien's education, training, license, and experience must:
 - (I) meet all applicable statutory and regulatory requirements for entry into the United States under the classification specified in the application;
 - (II) be comparable to that required for an American health-care worker of the same type;
 - (III) be authentic and, in the case of a license, unencumbered;
- (ii) The alien must have the level of competence in oral and written English considered by the Secretary of Health and Human Services... to be appropriate for health care work of the kind in which the alien will be engaged, as shown by an appropriate score on one or more nationally recognized, commercially available, standardized assessments of the applicant's ability to speak and write; and
- (iii) If a majority of States licensing the profession in which the alien intends to work recognizes a test predicting the success on the profession's

licensing or certification examination, the alien has passed such a test or has passed such an examination.

Currently, the English exam requirements may be met by passing the Test of English as Foreign Language (TOEFL), the Test of Spoken English (TSE) and the Test of Written English (TWE). Score requirements are as follows: TOEFL Paper-Based 540; TOEFL Computer-Based 207; Test of Written English (TWE) 4.0; Test of Spoken English (TSE) 50.

On February 24, 2003, CGFNS is expected to begin accepting exam results from two new exam services: 1) the International English Language Testing Service (IELTS) and 2) the Test of English in International Communication (TOEIC).

It is not necessary for the nurse to have completed the VisaScreen prior to filing the I-140 with the INS; they must only have a CGFNS certificate or passage of the NCLEX for this step. However, before an immigrant visa will be issued the nurse must have obtained the VisaScreen from the International Healthcare Authority, a division of CGFNS. In order to meet the educational requirements for the VisaScreen program, applicants must have:

1. Successfully completed a senior secondary school education that is separate from their professional education;
2. Graduated from a government-approved, professional healthcare program of at least two years in length;
3. Successfully completed a minimum number of clock and/or credit hours in specific theoretical and clinical areas during their professional program;

If the nurse was educated outside the U.S. they must also provide evidence of licensure and registration in the country of education and evidence that they have a CGFNS certificate or have passed the NCLEX-RN exam.

The Certified Statement

There is one exception to the requirement of obtaining a VisaScreen certificate. This exception exists for nurses who:

1. Completed their nursing education in English from certain designated countries;
2. Have a valid, unencumbered license as a registered nurse in a state where the nurse intends to be employed
3. Have passed the NCLEX examination

The nurse must still complete the VisaScreen application and pay the required fee. However, the application will be completed within 35 days (which is a must shorter process than the normal VisaScreen process). Only nurses from the following designated countries may obtain a Certified Statement: Australia, Canada (except Quebec), Ireland, New Zealand, South Africa, the United Kingdom, and the United States.

This exception is most common with Canadian nurses who have entered the United States in TN status and become licensed in the state in which they are currently employed.

Final Steps

Upon approval of the I-140 and receipt of the VisaScreen certificate, a nurse is eligible to obtain their immigrant visa through consular processing. If they are in the United States in a lawful status they may adjust their status to that of permanent resident. Nurses are still required to adhere to licensing requirements of the state in which they intend to work.

Licensing requirements for registered nurses are maintained on a state-by-state basis, and each state has slightly different requirements for licensing. To demonstrate eligibility and preparedness for the NCLEX exam, most states require a combination of materials with the license application, which may include CGFNS certification, copies of foreign academic credentials with certified translations, an education/credentials evaluation and a demonstration of proficiency in English (e.g. TOEFL exam results).

All states permit an individual to obtain a license through examination, and some state permit licensing by endorsement, or acceptance of a registered nurse license from another state or country as evidence of the person's credentials. Again, requirements vary from state to state.

Adjustment of Status

If a nurse is in the United States, then processing via adjustment of status will typically be easier and it will be possible to get authorization to work much more quickly than through consular processing.

A nurse's employer must file an I-140 for a nurse in the United States just like a nurse residing abroad. But a nurse in the US has the ability to take the NCLEX examination. If the nurse can pass the NCLEX exam, then it is not necessary to take the CGFNS examination. Otherwise, the nurse would still need to present a CGFNS certificate or proof that the nurse has a full and unrestricted license as an RN. Once the I-140 is approved, the nurse can file an adjustment of status application as well as an application for an employment authorization document. Once the nurse is licensed by a state and the nurse is in possession of an employment authorization document, the nurse can begin work. Adjustment applications typically take 18 to 24 months at INS regional service centers. A nurse would still need to present a VisaScreen Certificate prior to completing adjustment of status.

The Future

A highly significant piece of legislation to affect immigration for nurses was introduced in the summer of 2001. HR 2705, the Rural and Urban Health Care Act of 2001, makes changes to section 212(m) of the Immigration and Nationality Act regarding H-1C workers. The H-1C program is designed to permit nurses to come to the U.S. as nonimmigrant or temporary workers. The H-1C program, as noted above, has failed to provide the promised relief from the current nursing shortage in the U.S. Presently, employers must rely primarily on filing Schedule A applications with petitions for immigrant visas. As we noted earlier, these applications suffer long

service center backlogs followed by the inefficient mechanism of consular processing. The result is waiting periods of at least a year from starting the process for immigrant workers to the employees' arriving in the United States.

HR 2705 proposes substantial changes in a variety of areas including the number of H-1C visas issued per fiscal year, as well as in the employer's attestation requirements. The result could be the first major relief from a nursing shortage that has continued to tighten its grip on the United States despite the availability of Schedule A processing for immigrant visas for nurses and the, now defunct, H-1A nonimmigrant nursing program of the mid-1990s. Below is a comparison of the existing law for H-1C workers and the new HR 2705.

Perhaps the most significant difference in the two statutes is the number of H-1C visas that are available under the existing law and the proposed law under HR 2705. The existing law limits the number of visas available each year to 500 with additional per state limits that allow only 25 visas per year for states with a population of fewer than 9 million people and 50 visas per year for states with a population of 9 million or more people. These limits have made the H-1C functionally irrelevant as a means of relief from the current nursing shortage. HR 2705, on the other hand, provides substantial relief, permitting a total of 195,000 visas for each fiscal year with no per state limits. These 195,000 visas are provided each year with no reduction, progressive or otherwise, in the number available.

In addition to increasing the overall number of H-1C visas, HR 2705 substantially lengthens the life of the H-1C program. The existing H-1C statute was passed in 1999 and was given a life of 4 years before its sunset in 2004. HR 2705, on the other hand, has no provision that limits the life of the H-1C program.

As added relief from what the health care industry generally accepts as a nationwide nursing shortage, HR 2705 significantly increases the pool of eligible petitioners for H-1C workers. HR 2705 removes the component from the employer attestation that requires the employer facility be a hospital in a Health Professional Shortage Area (HPSA) as determined by the department of Health and Human Services. HPSA areas are generally limited to rural and underserved urban areas. The change would significantly increase the number of eligible petitioners.

In addition to removing the HPSA requirement, HR 2705 provides further relief by broadening the definition of a qualifying facility from simply "hospital" to, "a hospital, nursing home, skilled nursing facility, registry, clinic, assisted-living center, and employer who employs nurses in a home setting."

The attestation requirement between the existing law and HR 2705 is similar in that both schemes require that hiring the H-1C worker does not adversely affect the wages and working conditions of registered nurses similarly employed. However, HR 2705 specifically restricts the adverse affect requirement to those registered nurses, "at the facility." This removes the requirement that employers attest that they will not adversely affect the working conditions of employees at other facilities in the same geographic area. Currently most employers sponsoring an alien worker must attest that the employment will not affect any similarly situated worker within commuting distance of the petitioning employer.

HR 2705 also proposes a change in the attestation requirement of the existing law where it removes the requirement that the employer will not employ greater than

33% of the number of registered nurses employed at the facility. The change, along with the proposed increase to 195,000 visas available each year, would provide much needed relief for woefully understaffed facilities.

Other changes in the law include limits on state licensing authority to tighten restrictions for those applying to sit for the examination. HR 2705 limits the number of times that the individual may sit for the exam to two times, but also states that the failure of the alien to obtain a social security number will not disqualify that individual from sitting for the exam.

While HR 2705 makes some significant changes to the H-1C program, there are a number of similarities in the existing H-1C statute and HR 2705. In reviewing the attestation requirements, both the existing law and 2705 require that the employer pay the H-1C worker at the same wage rate as similarly employed workers in the facility. Also, both statutes restrict the employer's ability to transfer the H-1C worker to another location. Outside the attestation requirement, the statutes are similar in that they both forbid the employer to penalize the employee for departing prior to an agreed date.

HR 2705 is the first legislative response in several years to what amounts to a true labor crisis in the United States. The existing H-1C scheme plays lip service to the crisis but is so narrowly drawn that its effect is virtually negligible. HR 2705 addresses a number of employer concerns that would provide immediate relief for facilities who must currently meet market expectations that they provide the best health care services in the world without the ability to meet even their most fundamental staffing needs.

While HR 2705 did not pass last year, it is very possible that the bill will be reintroduced this session and the ever-growing nurse shortage means that the odds of passage will continue to improve.

Conclusion

The immigration process may seem somewhat like a maze. However, with proper guidance and some practical experience, it should not discourage a potential employer from pursuing prospective employees. Those who have been successful in obtaining international employees often find them to be very dedicated staff members. Given the current labor crisis in the healthcare industry, the international labor market should not be discounted.

3. ASK VISALAW.COM

If you have a question on immigration matters, write Ask-visalaw@visalaw.com. We can't answer every question, but if you ask a short question that can be answered concisely, we'll consider it for publication. Remember, these questions are only intended to provide general information. You should consult with your own attorney before acting on information you see here.

Q - Hi there. If a petition is filed for H1 B status using Premium Process, how soon does INS issue a receipt or "Notice of Action". Does the 15 days to approve begin after the notice is issued?

A - In our experience, you'll receive a receipt for the case within a week.

Q - I just got my R1 petition approved. I am currently on an F1 status and my I-20 and F1 visa will expire in May 2003. My question is, do I need to keep on renewing my I-20 for me to continue taking some courses in my school?

A - If your approval was for a change of status, then you are probably already an R-1 and you don't need to renew your I-20 any more. As for taking classes, while working in R-1 status, there is no official guidance on this to my knowledge. If you take classes that are related to your R-1 work and are not enrolled in a degree program or studying full time, you can arguably say that the courses were part of your professional development and are part of your job duties. Definitely consult with your immigration lawyer before doing anything.

Q - I received my green card in April of 2001 and on it said that I was a permanent since September 1997. I applied for naturalization in September of last year and was interviewed this month. The interview went well and I was given the approval letter pending schedule of the oath taking. The next day, I got a call from the INS officer that interviewed me. She said that I have to go back to her office to withdraw my application as I am not yet qualified for naturalization since my adjustment of status was only approved in March 2001. For some reason they have made a mistake in processing my greencard indicating the wrong date. What do I have to do? Can I demand for a refund for what I paid since it was their fault and not mine?

A - You're going to be out of luck here. Even if the INS erred on the date listed on your green card, the law is clear regarding residency, and you are still expected to comply with the rules. Also, presumably you knew that the rule is that you must be a permanent resident for five years before you can apply to naturalize. You assumed that the date on the back of your green card determined when you could apply for naturalization and that you could benefit from the INS' mistake. Presumably, you are bright enough to know that you became a permanent resident in 2001 and not 1997. You sought to benefit from the INS' mistake and even if the agency could refund fees - which they almost never will - you are at fault here as well. I would wait until 2006 and reapply then. The INS wasted valuable resources working on this case so they - and, consequently, people who had legitimate applications pending - have already paid for this mistake.

Q - My wife would like to start an 'ethnic' catering business with her sister who is a British citizen. My wife's status is ' permanent resident '. They intend to be equal partners in the business. Can her sister legally run the business and travel back and forth between the US and UK without any restrictions.

A - There may be a couple of strategies available to your sister-in-law, but typically the E-2 visa is the one available for entrepreneurs wishing to start businesses in the US. If your sister-in-law has worked with a business in the last three years that could sponsor her to come to the US, then an L-1 visa might work. The E-2 visa requires, among other things, substantial investment by your sister-in-law and that the business be owned 50% or more by British nationals who are not permanent residents of the US. That means that your sister-in-law would likely need to own at least 50.01% of the shares of the business. However, you can always set up a separate voting agreement to give your wife and her sister equal votes. You might want to read the article on our web site at <http://www.visalaw.com/00feb2/7feb200.html>.

4. BORDER NEWS

In a cooperative effort with Canadian and Nigerian authorities, the INS deported 89 illegal aliens to Nigeria, including several war criminals. Sixty-eight had been illegally present in the United States and many of those had committed crimes including possession of narcotics, trafficking, assault and battery, fraud, robbery, burglary and rape. The other 21 deportees were illegally present in Canada and had serious criminal convictions including war crimes in Nigeria. Upon arrival in Lagos, the individuals were taken into the custody of the Nigerian government.

A study mandated by the PATRIOT Act and the Enhanced Border Security Act concluded that the biometric system used to protect the nation's borders should be a dual approach employing both fingerprints and facial recognition technology. The technologies will become the federal standard for identity documents to be issued to foreigners starting next year. Scientists at the Department of Commerce's National Institute of Standards and Technology (NIST) made the recommendation in a report recently delivered to Congress. NIST's evaluations studied two applications: positively identifying visa applicants and verifying that the holder of a visa is the person to whom it was issued.

New York Senator and former First Lady Hillary Clinton announced this week that she would support a national identification card for US citizens if other measures to keep illegals out of the country failed. Clinton said she would support it as part of an overall effort to improve national security.

"Clearly, we have to make some tough decisions as a country," Clinton warned. "And one of them ought to be coming up with a much better entry and exit system so that if we're going to let people in for the work that otherwise would not be done, let's have a system that keeps track of them."

Early this week a U.S. Border Patrol agent was knocked unconscious while following a group of people who believed were illegal entrants, when he came upon a second group of suspected illegal entrants, according to a FBI spokeswoman. When the

agent encountered the second group, several of them attacked him at once and hit him on the head, back and neck with a large rock. The agent lost consciousness and lay on the ground about 40 minutes until he was found by another agent. He was released the next morning. No suspects are in custody.

Gabriela Rodriguez, a Costa Rican who serves as U.N. special expert on the rights of migrants, said independent human rights workers should be allowed access to Mexican illegal immigrants detained in the United States, in an 18-page report to the U.N. Human Rights Commission. Rodriguez said detained migrants have no access to free legal assistance and many fail to complain about abuses because they know they will be kept in detention as witnesses. Rodriguez also said many are subject to xenophobia and exploitation on both sides of the border.

Hospitals near the Mexican border are blaming the money woes on undocumented immigrants. The complaints have triggered a study that concluded that emergency medical care provided to illegal immigrants resulted in nearly \$190 million worth of unpaid hospital bills in year 2000. Under federal law, hospitals must treat anyone who seeks emergency medical care, regardless of their income or immigration status. Because ER officials aren't allowed to ask about a patients's immigration status, they don't know what percentage of unpaid bills can be attributed to undocumented Mexicans. The study used statistics on the number of patients admitted for emergency care without providing Social Security numbers.

Republican Senator Jon Kyl obtained federal funding for the study and plans to introduce a measure next week to help reimburse states and health providers for the cost of treating undocumented immigrants. The bill calls for \$500 million in federal money to go to states and is similar to one he wrote last year that was not passed.

5. NEWS FROM THE COURTS

Chelladurai v. Infinite Solutions, CASE NO. 2003-LCA-00004, U.S. Department of Labor Office of Administrative Law Judges

In this case, Chelladurai filed a complaint with the Wage and Hour Division of the Employment Standards Administration of the United States Department of Labor, The question of whether an employer has an obligation to pay an employee the prevailing wage when an H-1B petition is filed even if the employee is not ultimately hired was the subject of this matter.

The case involved a company that filed a Labor Condition Application on behalf of a worker. The change of status application was approved, but the company was not able to find work for the worker and "terminated" her. In actuality, the worker never was paid by the company for any work. The LCA was approved on April 9, 2001. The employer notified the worker on May 21, 2001 that it was unable to find work for her.

The worker attempted to seek back pay dating to January 2001. She based this on the fact that she was present at the employer's office on several occasions prior to April 2001. She attended a computer class, sent and received emails soliciting potential work for herself as an employee of the petitioner and gave advice on one project with which the employer was allegedly having problems.

The worker argued that the employer intended to take advantage of the H-1B portability rules. However, the employer argued that his letter to the INS with the application specifically stated that the employer was to begin "only after approval of this petition and the issuance of an H-1B visa". Therefore, the court found that the duty to pay the back wages dated from April 16th, the date of the H-1B approval end to the date of termination.

In re Bassel Nabih ASSAAD, Respondent
File A72 824 993 - Houston
Decided February 12, 2003

In this case, the INS sought to have the landmark decision *Matter of Lozada* reexamined and overturned by the Board of Immigration Appeals. *Matter of Lozada* allows a respondent to assert a claim of ineffective assistance of counsel in an immigration proceeding.

The INS argued in this case that *Matter of Lozada* contradicts a United States Supreme Court case, *Coleman v. Thompson*, that states that where there is no constitutional right to the appointment of counsel at government expense, there is no constitutional basis for a claim of ineffective assistance of counsel.

In *Matter of Lozada*, the Board of Immigration Appeals set forth the rules for a claim of ineffective assistance of counsel. First, the alien must submit an affidavit detailing the agreement that was entered with the first lawyer with respect to the actions to be taken and the representations the first lawyer made or did not make. Second, the alien must inform the first lawyer of the allegations of ineffective assistance of counsel and give him or her the opportunity to respond. Third, the alien must file a complaint with the appropriate disciplinary authority, such as a state bar, with respect to any violation of counsel's ethical or legal responsibilities, or adequately explain why no filing was made. Finally, the alien must show why he or she was prejudiced by the actions or inactions of counsel.

The BIA rejected the INS' arguments. Though the *Coleman* decision was rendered by the Supreme Court more than ten years ago, the INS never raised to challenge *Lozada* in subsequent cases before the BIA. Furthermore, for more than a decade the circuit courts have recognized *Lozada* as a valid precedent setting forth procedures by which respondents can present claims of ineffective assistance of counsel. The BIA also noted that the *Coleman* decision involved a criminal case and not an immigration case.

Iyengar v. Barnhart, US District Court for the District of Columbia

This case is a class action law suit where several plaintiffs argued that the Social Security Administration violated the Administrative Procedures Act when it issued an interpretation that expressly states that obtaining a drivers license is not a legitimate reason to issue a social security number. In 2002, the SSA changed its longstanding policy of recognizing obtaining a driver's license as a legitimate reason to request a Social Security Number.

The Social Security Administration argued that the change is merely an interpretive rule not requiring a notice and comment period. The court disagreed noting "When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." That was the case here since the SSA expressly stated that obtaining a driver's license was a legitimate basis for obtaining a Social Security Number. The court has therefore declared the SSA rule to be invalid.

6. GOVERNMENT PROCESSING TIMES

These are not official INS times, nor are they endorsed by the Central Office.

Source: [American Immigration Lawyers Association](#)

California Service Center Processing Time Report (2/1/03)

Posted on AILA InfoNet at Doc. No. 03021140 (Feb. 11, 2003)

California Service Center Processing Time Report 2/1/03	
Form	We are Processing cases with these receipt notice dates:
I-90 to replace lost, damaged or destroyed I-551	5/6/2002
I-90 to renew expiring I-551	5/6/2002
I-102 for replacement/initial nonimmigrant arrival/departure form	2/3/2002
I-129 for H1B classification COS 8/26/2002	
I-129 for H2A classification 2/3/2003	
I-129 for H2B classification 1/3/2003	
I-129 for H3 classification 10/7/2002	
I-129 for E classification 7/29/2002	
I-129 for L classification	12/16/2002
I-129 for Blanket L petition	2/3/2003
I-129 for O classification	7/22/2002
I-129 for P classification	7/22/2002

I-129 for Q classification	7/22/2002
I-129 for R classification	6/6/2002
I-129 for TN classification	
I-129F (fiancée)	11/19/2002
I-130 for spouse, parent, or child (under 21) of a United States citizen	7/26/2002
I-130 for Spouse/Child of a lawful permanent resident 1/12/1998	
I-130 for Unmarried son/daughter (over 21) of a lawful permanent resident	4/6/1998
I-130 for Married Son/daughter of a United States citizen	10/6/1999
I-130 for Brother/Sister of United States citizen	4/2/1998
I-131 for Advance Parole	1/15/2003
I-131 for Advance Parole for HRIFA principal applicant	
I-131 for Reentry Permit	
I-131 for Refugee Travel Document	
I-140 A (extraordinary ability)	9/27/2002
I-140 B (outstanding professor or researcher)	8/12/2002
I-140 C (multinational executive or manager)	10/16/2002
I-140 D (professional holding adv. degree/alien of exceptional ability)	10/23/2002
I-140 E (skilled worker or professional)	10/16/2002
I-140 I (National Interest Waiver)	12/27/2002
I-140 G (other worker)	12/3/2002
I-212 permission to reapply for admission after deportation/removal	1/19/2001
I-360 petition for Amerasian, widow(er), or Special Immigrant	12/11/2002
I-485 Asylum-based	
I-485 Refugee-based	
I-485 Employment-based	11/16/2001
I-485 Haitian Refugee Immigration Fairness Act (HRIFA)-based	
I-539 for extension of stay for F or M non-immigrant	1/9/2003
I-539 for extension of stay for J non-immigrant	
I-539 for extension of stay for L or H non-immigrant	12/5/2002
I-539 for extension of stay for other non-	12/5/2002

immigrant	
I-539 to change nonimmigrant classification to F or M	1/9/2003
I-539 to change nonimmigrant classification to J	
I-539 to change nonimmigrant classification to L or H	12/5/2002
I-539 to change to other nonimmigrant classification	1/2/2003
I-612 waiver of foreign residence requirement	7/3/2002
I-730 Refugee/Asylee Relative Petition	
I-751 Petition to Remove Conditions on Residence	7/8/2002
I-765 for initial asylee or asylum applicant authorization	Current
I-765 for employment authorization associated with Hurricane Mitch TPS	Current
I-765 for employment authorization associated with El Salvador TPS	Current
I-765 for employment authorization while I-485 is pending	9/9/2002
I-765 for all other employment authorization	8/14/2002
I-817 Application for Family Unity Benefits	6/14/2002
I-821 for El Salvador	4/17/2002
I-821 for Hurricane Mitch countries	12/20/2002
I-824 Application for Action on an Approved Application or Petition	3/22/2002
I-829 Petition by Entrepreneur to Remove Conditions	10/23/2000
I-914 Application for T Non-Immigrant	

7. NEWS BYTES

The American Bar Association's House of Delegates has approved a resolution urging important changes in the way suspected terrorists are treated by the American government. The resolutions four points are

1. US citizens and residents who are detained within the US based on their designation as "enemy combatants" should be afforded the opportunity for meaningful judicial review of their status under a standard the reviewing court determines is appropriate to balance the needs of the detainee with national security concerns;

2. US citizens and residents detained as "enemy combatants" should not be denied access to counsel subject to appropriate conditions designed to balance the needs of the detainee with the requirements of national security;

3. Congress and the Executive Branch should establish clear standards and procedures and procedures governing the designation and treatment of people designated as "enemy combatants"; and

4. Congress and the Executive Branch should consider how their policy regarding "enemy combatants" may affect the response of other nations to future acts of terrorism.

The INS' Immigrant Services Division has informed the American Immigration Lawyers Association that in the case of an I-485 applicant who holds a valid employment authorization document, an I-765 may be submitted while an applicant happens to be outside the US. But the form must have a US address for the applicant and the applicant must intend to return to the US.

The Justice Department has issued regulations governing the enrollment of foreign nationals in flight training programs. The rules are issued based on the Aviation and Transportation Security Act which prohibits certain aviation schools training students on aircraft weighing more than 12,500 pounds or more unless the school notifies the Attorney General of the identity of the student and the Attorney General does not notify the school within 45 days that the candidate presents a risk to aviation or national security.

The Director of the INS' Chicago District Office has announced that he will retire on March 1st, the day the INS joins the Department of Homeland Security. Brian Perryman, 56, released a statement stating that he was pleased the INS improved customer service while maintaining a commitment to enforcing the nation's immigration laws.

Testimony continued this week in the trial against Tyson Foods. Tyson and several managers are facing charges related to an extensive scheme to smuggle Mexican workers into the US. Government officials testified that alien smugglers were paid with checks printed with the address of the company's corporate headquarters. Prosecutors argue that this shows that top executives must have known about and condoned the hiring of illegal workers. A Tyson spokesman argues that the checks only show that certain rogue employees participated in the scheme. Furthermore, the company contends that they will present other evidence to show that the involved employees "went to great lengths to make sure no one at corporate headquarters knew what was going on." For more extensive information on the case, see the article published last week in this newsletter at <http://www.visalaw.com/03feb1/11feb103.html>.

A former senior inspector for the INS who worked at the airport in Calgary, Canada has been deported by the Canadian government back to the US. The inspector just completed a six month jail term for a bribery scheme. The inspector, Hector Ramirez Garcia, was convicted for a scheme that involved creating a company that took nearly \$30,000 from Hydro Kleen Group Inc. of Red Deer, Alberta. Garcia entered the names of staffers from Hydro Kleen's two main competitors into a US computer alert system in order to delay their employees at the border. One of the two affected companies, Eliminator Pigging Systems, Inc. folded after Garcia stopped the company's staff from fulfilling contracts in the United States. Hydro Kleen has already paid the other company, Innovative Coke Expulsion, Inc., \$300,000 to settle a civil lawsuit.

8. INTERNATIONAL ROUNDUP

Iraq Grants Visas To 'Human Shields'

Reuters reports that a group of 50 Western anti-war activists were approved for visas Tuesday to enter Iraq and act as "human shields," hoping to deter a U.S.-led military operation.

The group held a press conference in Turkey and is made a brief tour of the region before it crossed the border into Iraq. They plan to inhabit populated areas of Baghdad and other parts of the country.

Last week, Turkey deported one man who helped organize the campaign, a former U.S. marine named Ken Nichols who tried to enter the country with documents describing himself as a "citizen of the world."

Britain Gives Asylum to Three Ex-Taliban Fighters

The British government granted asylum to three former Taliban fighters, but insisted that none had engaged in direct combat in Afghanistan with British or American troops. Immigration Minister Beverly Hughes said the three gave credible accounts of being forcibly conscripted by the Taliban and having escaped as soon as they could.

New Law Allows Overseas Filipinos To Vote

Philippines President Gloria Macapagal Arroyo signed a bill into law late last week allowing millions of Filipinos overseas to vote. The country is struggling to improve its electoral system, which has been known from fraud, slow ballot counting and favoring rich and famous candidates. Senate President Franklin Drilon said overseas ballots would improve elections because voters outside the country would be beyond the reach of bad politicians. However, the law includes a provision that requires permanent overseas residents to return and live in the Philippines three years after

voting, and is likely to dissuade about three million people from voting, lawmakers said. The overseas Filipinos would be a large voting bloc, accounting for around 10% of the total electorate.

Kenya Cuts Visa Processing Time To 24 Hours

Kenya's Home Affairs Minister Moody Awori said the government will process visas within 24 hours of the application being submitted, provided the application requirements have been fulfilled.

Awori's statement came in response to Pakistan High Commissioner to Kenya, Hameed Kidwai, who expressed frustration at the time taken by Pakistani nationals to obtain visas.

Kenya had tightened its visa application process after the 1998 explosion in Nairobi and Tanzania.

9. INS' NEW STATISTICAL YEARBOOK SHOWS LATEST TRENDS IN IMMIGRATION

The INS has released its 2001 Statistical Yearbook. It can be found online at <http://www.immigration.gov/graphics/aboutins/statistics/Yearbook2001.pdf>. The report had a number of highlights:

- refugee arrivals declined for the second consecutive year representing the lowest level since fiscal year 1987
- nonimmigrant admissions declined for the first time since 1984
- Legal immigration in 2001 (1,064,318) was higher than in 2000 (849,807) due primarily to efforts to reduce the applications backlog at the INS
- 38% of all immigrants were born in North America (19% in Mexico) and 33% were born in Asia
- 65% of all immigrants intended to reside in six states: California, New York, Florida, Texas, Illinois and New Jersey
- About 20% of all immigrants intended to reside in New York City or Los Angeles.
- Nearly half of all nonimmigrant admissions (32.8 million) were from four countries - Japan (15.4%), the United Kingdom (14.9%), Mexico (13.2%) and Germany (5.3%)
- Nearly half of the H-1B workers were born in India; the next highest country is China at 9%
- 608,225 people naturalized in fiscal year 2001; 41% were Asian-born and 33% were from North American countries

- 71,000 criminal aliens were removed; 80% of the removed criminal aliens were from Mexico

10. INS ASSURES PUBLIC ALL SERVICES WILL CONTINUE AFTER NEW AGENCY TAKES OVER

On March 3rd, the INS will cease to exist and the new Bureau of Citizenship and Immigration Services, a new agency within the Department of Homeland Security, will take over.

In order to combat rumors that the INS intends to close local offices on March 3rd, the INS' Community Affairs Office issued an advisory. According to the INS, the rumors are totally false.

All local offices, Application Support Centers, regional service centers and asylum offices will remain in the same locations. Furthermore, all forms and documents issued by the INS will remain valid when the agency goes away.

The INS' web page will still operate, but under the domain name www.bcis.gov or www.immigration.gov.

11. TEXAS ATTORNEY GENERAL TARGETS "NOTARIOS"

Texas Attorney General Greg Abbott has issued a warning about an ongoing scam targeting Hispanic immigrants in Texas. The scam has been perpetuated, according to Abbott, by con artists posing as licensed attorneys or other legal experts.

The warning has been accompanied by a public outreach effort to educate the public about ways they can protect themselves. Also, Abbott announced a judgment against an Austin area woman found to have been perpetrating this type of fraud.

"Notarios" typically obtain a notary public license and then market themselves to the Spanish-speaking community as a "notario publico." Notario publicos in Mexico are licensed attorneys. In the US, a notary public license is relatively easy to obtain and only authorizes someone to witness the signing of legal documents. In Texas, it is illegal for notaries to provide any type of immigration services unless they hold a separate license to practice law.

Abbott noted that many "notarios" charge exorbitant fees, file unnecessary documents, disappear with money and perform poor services that jeopardize clients' cases.

"The abuses perpetrated by fraudulent 'notarios' and their likes have caused much suffering for Texas families," said Attorney General Abbott. "These schemes also create chaos in an already overburdened immigration system," he added.

The Travis County judgment was against Barbara Seigert, a notary public, who had offered to fill out and process immigration forms on behalf of consumers. The

judgment stops Ms. Seigert from selling her services to immigrants or using the Spanish terms "notario" or "notario público" in her advertising. She also faces more than \$4,000 in fines, attorneys fees, and restitution. Repeat violators of the notary statute can face jail time.

12. State Department Visa Bulletin for March 2003

IMMIGRANT NUMBERS FOR MARCH 2003

Priority Dates for Family Based Immigrant Visas			
	All Chargeability Areas Except Those Listed	MEXICO	PHILIPPINES
Family			
1 st	22JUN99	01MAY93	01APR90
2A*	08DEC97	01JUL95	08DEC97
2B	01JUL94	08NOV91	01JUL94
3 rd	22FEB97	22MAR93	08DEC89
4 th	08MAR91	08MAR91	15DEC81

*NOTE: For March, 2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 01JUL95. 2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 01JUL95 and earlier than 08DEC97. (All 2A numbers provided for MEXICO are exempt from the per-country limit; there are no 2A numbers for MEXICO subject to per-country limit.)

Priority Dates for Employment-Based Immigrant Visas			
	All Chargeability	MEXICO	PHILIPPINES

	Areas Except Those Listed		
Employment -Based			
1 st	C	C	C
2 nd	C	C	C
3 rd	C	C	C
Other Workers	C	C	C
4 th	C	C	C
Certain Religious Workers	C	C	C
5 th	C	C	C
Targeted Employment Areas/Regional Centers	C	C	C

B. DIVERSITY IMMIGRANT (DV) CATEGORY

Section 203(c) of the Immigration and Nationality Act provides a maximum of up to 55,000 immigrant visas each fiscal year to permit immigration opportunities for persons from countries other than the principal sources of current immigration to the United States. The Nicaraguan and Central American Relief Act (NCARA) passed by Congress in November 1997 stipulates that beginning with DV-99, and for as long as necessary, up to 5,000 of the 55,000 annually-allocated diversity visas will be made available for use under the NCARA program. This reduction has resulted in the DV-2003 annual limit being reduced to 50,000. DV visas are divided among six geographic regions. No one country can receive more than seven percent of the available diversity visas in any one year.

For March, immigrant numbers in the DV category are available to qualified DV-2003 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

All DV Chargeability Areas Except Those Listed Separately
Region

AFRICA: AF 14,150
ASIA: AS 8,400, Except: BANGLADESH 6,600
EUROPE: EU 22,500
NORTH AMERICA (BAHAMAS): NA 13
OCEANIA: OC 345
SOUTH AMERICA, and the CARIBBEAN: SA 975

C. ADVANCE NOTIFICATION OF THE DIVERSITY (DV) IMMIGRANT CATEGORY RANK CUT-OFFS WHICH WILL APPLY IN MARCH

For April, immigrant numbers in the DV category are available to qualified DV-2003 applicants chargeable to all regions/eligible countries as follows. When an allocation cut-off number is shown, visas are available only for applicants with DV regional lottery rank numbers BELOW the specified allocation cut-off number:

All DV Chargeability Areas Except Those Listed Separately

Region

AFRICA: AF 16,500
ASIA: AS 10,400, Except: BANGLADESH 7,950
EUROPE: EU 26,250
NORTH AMERICA (BAHAMAS): NA 13
OCEANIA: OC 410
SOUTH AMERICA, and the CARIBBEAN: SA 1,140

D. PHILIPPINES VISA AVAILABILITY IN THE COMING MONTHS

Continued heavy applicant demand for numbers in the PHILIPPINES Family First, Third, and Fourth preference categories could require the retrogression of those cut-off dates later in the year. This action would be necessary to hold visa issuance within the annual numerical limits.

13. ANOTHER CONSULAR OFFICER GUILTY OF VISA FRAUD

Last week we reported on the closing of the US consulate in Nuevo Laredo, Mexico after it was discovered that several employees were selling visas. Another scandal has been revealed in the consular system, this time affecting America's consulate in Prague.

Alexander Meerovich, a career Foreign Service officer, has pled guilty to visa fraud. Meerovich served as a consular officer in Prague from August 1999 to July 2002. Meerovich acknowledges that he sold at least 85 fraudulent visas over a two year period while serving as deputy consul general at the US Embassy. According to prosecutors, Meerovich may have made \$50,000 in the scheme.

The State Department issued a public statement apologizing for the affair:

" We deeply regret the criminal actions of Mr. Meerovich. We entrusted him with maintaining the integrity of the visa process, a critical component in the protection of U.S. borders, during his assignment to Prague. We will continue to work closely with

the Department of Justice to ensure that Mr. Meerovich is appropriately punished for his crimes."

Meerovich is likely to face about two years in prison.

14. AMERICAN IMMIGRATION LAWYERS ASSOCIATION SUBMITS COMMENTS ON
NEW HHS J-1 PHYSICIAN WAIVER PROGRAM

The American Immigration Lawyers Association has submitted its comments on the US Department of Health and Human Service's recently announced J-1 waiver program for primary care physicians working in underserved areas. The comment was primarily authored by AILA members Greg Siskind, Robert Aronson and Robert Deasy. The program is in force, but from a practical viewpoint, HHS is not likely to adjudicate any cases for a few more months while it gets its procedures in place.

The comment submitted to the State Department reads as follows:

February 3, 2003

Hand Delivered

Dr. William R. Steiger
Office of Global Health Affairs
200 Independence Ave., SW
Room 639-H
Washington, DC 20201

Re: Comments to "HHS Exchange Visitor Program; Request for Waiver of the Two-Year Foreign Residence Requirement," RIN: 0991-AB21 (67 Fed. Reg. 77692 (Dec. 19, 2002))

Dear Dr. Steiger:

The following are the comments of the American Immigration Lawyers Association (AILA) to the Interim Rule issued by the Department of Health and Human Services (HHS) which creates a formal program through which the Department shall serve as an Interested Government Agency (IGA) for International Medical Graduates seeking waivers of their two-year home residence obligation through employment in designated medically underserved communities.

The subject Interim Rule was published in the Federal Register, 67 Fed. Reg. 77692 (December 19, 2002), with an immediately effective date. The period for public comment was set at February 3, 2003. This comment filed by AILA is submitted timely to the Department's announced deadline.

AILA is the bar association of more than 7,800 attorneys and law professors who practice and teach in the field of immigration and nationality law. AILA members represent persons, entities, and businesses across the immigration spectrum, as well as teach and advocate on all fronts involving immigration issues. Particularly given

the dynamics of this country's healthcare system, AILA members have over the years represented the immigration interests of a broad range of medical facilities, hospitals, academic medical institutions, healthcare providers, and alien physicians in obtaining immigration benefits spanning both clinical practice and biomedical research efforts.

It is this dual background of a commitment to the overall practice and development of immigration law and policy and a more focused involvement in immigration matters within the healthcare community which form the background to the comments which AILA is now providing to you. We appreciate this opportunity to work with the Department to contribute to a national commitment of affording quality and accessible physician services to our nation's inhabitants, regardless of their locale of residence or economic means.

Therefore, at the outset, AILA commends and supports the current efforts of the Department of Health and Human Services to create a waiver program in the public interest so as to tap into the pool of International Medical Graduates (IMGs) who will accept employment positions in practice sites designated as medically underserved in accordance with §332 of the Public Health Service Act.

We feel that this current waiver initiative by the Department of Health and Human Services is consistent with a broad range of other Congressionally enacted initiatives to facilitate the relocation and retention of physicians to designated medically underserved areas and facilities, including: the National Interest Waiver, the Conrad State 30 Program and, more generally, the J-1 Waiver Program, the National Health Service Corps, the State Loan Repayment Program, the Target Assistance Grant Program, the Community Rural Health Care Network, and the stepped up Medicare reimbursement schedules for designated rural and inner city providers. The purpose of these measures is to enhance the relocation and retention of physicians working in designated medically underserved communities, and these measures have been formulated specifically in recognition that the ongoing maldistribution patterns and the emerging physician shortage situation is a matter of public interest which needs to be forthrightly addressed.

In their totality, these are sustained, committed initiatives to provide adequate healthcare coverage to the roughly 64 million Americans living in communities which have been designated by the federal government as medically underserved, i.e., areas in which medical coverage falls short of minimally acceptable norms for adequate access to healthcare providers. This shortage is experienced most fully in Rural America as well as by many inner-city communities, and this problem is compounded by growing statistical evidence indicating an emerging and profound shortage in the overall physician population. Furthermore, this shortage pattern is disproportionately experienced by minorities, the indigent, and by many of the most vulnerable segments of American society. This basic situation of an ongoing, historically rooted maldistribution in the physician supply patterns has profound consequences for our entire national experience and forms the background for the determination by the Congress of the overall importance and the national interest implications of physician relocation to and retention in designated medically underserved communities.

We provide this brief background to highlight our strongly held belief that the current HHS initiative is consistent with a national commitment to provide adequate access

to healthcare coverage. Again, we commend the Department for initiating this waiver program as a service to the public interest.

We would, though, like to raise several matters of concern and/or inquiry.

COORDINATION WITH OTHER AGENCIES

According to the preamble to the Interim Final Rule, “HHS will consider information from and coordinate with State Department of Public Health (or the equivalent) [and] other IGAs that request waivers.”

We believe that the Department’s efforts in support of physician placement to medically underserved communities should be part of a broad national commitment which deserves and requires coordination and communication. However, we also recognize that the various government agencies serving as IGAs might well have different objectives, policies, and mandates. As such, we would hope that the Department would not make its own program subservient to the programs of other IGAs—particularly, the State Departments of Public Health.

In this regard, our initial conversations with officials at HHS have indicated that the Department does not intend to recommend a waiver unless the physician has first submitted the case to the state and is denied because the state has exhausted all available waiver slots for the fiscal year.

AILA believes such a policy would be a mistake for several reasons. First, such a policy would create unnecessary government waste, duplication, and inefficiency. Many states do not have a “first in, first out” system where cases are considered in the order in which they are submitted. If they do, it is not a substantial burden to simply tell employers that after 30 qualifying cases are submitted, they should look to HHS. Many states have an entry time period and will consider all applications received during the entry period, and the state’s health department will then select the cases that appear to best meet the needs of the residents of the particular state. Therefore, each application is reviewed extensively and then the 30 slots are filled in short order. Under the system contemplated by HHS, two extensive adjudications of the same application are very likely to take place—one by the state and one by HHS. Since the state offices that adjudicate waivers are typically leanly staffed, a system requiring two complete adjudications of a case is burdensome.

Second, State 30 programs and the HHS program may have goals that do not completely overlap and a state may not be interested in using an available slot for a physician that would otherwise meet the requirements of the HHS program. For example, a state’s regulations may limit that state’s waiver program to urban facilities. Or the state may reserve a certain number of waiver slots for university hospitals or for certain kinds of specialists. In any case, the states have shown a great sensitivity to local community healthcare coverage needs within the parameters of the federal program which may well lead the states to utilize the waiver program in a manner complementary to HHS’s focus on primary care practitioners.

Third, not all states adjudicate waiver applications at the beginning of a fiscal year. Some states deliberately hold back waiver slots for a later point in the fiscal year.

Forcing a community to wait many additional months in order to be denied a State 30 waiver only results in the unnecessary delay in the delivery of vital health services to people in need.

Furthermore, the creation of a one year window following conclusion of primary care medicine training makes it further infeasible to go through the entire state waiver review cycle prior to seeking a recommendation from HHS. There is simply too great a possibility that the delay resulting from the state's deliberations would cause a waiver to age-out for HHS purposes.

Therefore, we would envision that as a matter of administrative efficiency and service to the communities, HHS should not require a full review and adjudication by the states. Perhaps some formal consultation process would be in order in which the states would be notified of a facility's intention of filing a waiver application to HHS.

TWELVE MONTH WINDOW IN ORDER TO FILE THE J-1 WAIVER APPLICATION

AILA has various questions and reservations on the stated requirement that the waiver application be filed within 12-months of the completion of training in primary care medicine.

First, as a point of clarification, we assume that this 12-month filing deadline applies regardless of whether the alien has departed the United States or has commenced a program of specialty medical training.

Second, owing to potentially delayed HHS and INS adjudications, as well as possible delays in visa issuance, we strongly urge that the 12-month filing deadline be tolled at the time that a waiver application is initially filed with HHS, rather than upon commencement of the employment itself. The interests of HHS of not sanctioning specialty care physicians to participate in the waiver program is adequately preserved by the 90-day provision of INA §214(I)(1)(C)(ii) of the Immigration and Nationality Act (INA) which basically requires a physician to agree to the commencement of employment within 90 days of the final issuance of the waiver, and this provision adequately addresses any undue postponement of a physician's relocation to the community.

Third, while AILA understands HHS's interest in limiting its program to primary care physicians, we believe that a restriction that bars most physicians with specialty training from providing primary care services will unnecessarily deprive many deserving communities of vitally needed primary health care services.

The argument that physicians with specialty training are less likely to want to remain in a community upon completion of their three-year commitment is arguably not unreasonable. However, employers have an obvious incentive to hire physicians likely to remain in the community as long as possible. If the decision is made to offer a position to a physician with specialty training, it is reasonable as well to believe that the choice is the best option available. Having to search again for a new physician in three years may be an acceptable tradeoff for a community pessimistic about its chances of finding a doctor in the near or long term.

Fourth, the Interim Final Rule may also prevent some physicians with only primary care or general psychiatric training from participating in the waiver program. The Rule states that doctors must complete their primary care or psychiatric training no

more than twelve months before the date of commencement of employment under the employment contract. This effectively eliminates physicians who may go abroad, but not necessarily to their home country, for more than a year after completing their primary care training. It also would eliminate physicians who engage in non-clinical medical research after their residency training. And it would eliminate primary care physicians working on O-1 visas for more than a year after completing their residency training. Some of the best qualified primary care physicians would, consequently, be ineligible to provide primary care services under the waiver program.

Fifth, there is a growing practice pattern occurring particularly in Rural America in which specialty physicians serve as primary encounter physicians, particularly since nearly all specialty physicians need to gain Board Eligibility in a primary care discipline as part of their more advanced medical training. Therefore, we would ask that HHS favorably consider allowing physicians to complete a first tier course of training in a specialty medical care discipline so as to add an additional level of potential medical service to the community. Such an additional course of training would not erode primary care capabilities, but rather would enhance a physician's ability to serve the broad, primary care needs of the community.

Sixth, even if HHS will not rescind its total, across-the-board twelve-month rule, we think that certain allowances should be given to certain medical disciplines which clearly and unequivocally address the fundamental, primary healthcare needs of a community. In this regard, we would particularly cite the discipline of Geriatric Medicine which addresses the core, fundamental medical needs of the elderly. Similarly, the practice of General Surgery and Hospitalist Medicine fall into the same category—i.e., fundamental, primary encounter medicine of broad applicability to members of a community.

Seventh, HHS indicates that one of the Rule's purposes is to ensure that a doctor's training is current. However, this logic dismisses completely the value of a physician's experience. This policy suggests that a completely inexperienced physician will provide better care than a seasoned doctor with extensive clinical training. Furthermore, in an effort to ensure that licensed physicians maintain their currency in new medical developments, the state licensing boards require ongoing commitments to Continuing Medical Education which, we would think, addresses HHS's professed desire for physician conversancy in their areas of professional practice.

AILA therefore recommends, at minimum, that HHS approach this issue on a case by case basis rather than establishing a blanket rule. AILA believes that the completion of specialty training should simply be considered a factor in determining whether to grant a waiver, in conjunction with community needs and, quite importantly, the nature of the petitioning medical facility and its commitment to serving the needs of the indigent and medically underserved. We think that this is a particularly appropriate standard since the physician is absolutely bound to serve in the community for a full three-year period of time in H-1B Temporary Worker status in order to fulfill a fundamental requirement of the J-1 waiver which gives both HHS as well as the INS ongoing abilities to ensure that a physician is truly serving the broad needs of the community.

REQUIREMENTS OF THE PHYSICIAN

The Interim Final Rule seems to impose a professional practice standard on the physician beneficiary well beyond standard professional practice standards. To this end, the Rule at § 50.4(C) requires that a physician “possess outstanding qualifications, training and experience *well beyond* the usually expected accomplishments...and must clearly demonstrate the capability to make original and significant contributions to the program.” (emphasis added).

Given that we are now observing roughly the tenth anniversary of a sustained effort within various government agencies to serve as IGAs for waiver purposes, we do have some empirical evidence suggesting that the caliber of IGAs going to medically underserved areas might be higher than the norm, presumably not out of professional altruism within the IGA community, but rather out of a realistic accommodation by highly talented practitioners to the imperative of getting a waiver. As a result, rural and other designated communities have benefited from receiving the services of physicians possessing a professional skill set above the norm of physicians normally engaged in practice in some of this country’s less desirable practice opportunities.

However, we categorically reject a regulatory standard of outstanding qualifications above the norm of the profession. At minimum, this is an unwarranted violation of federalism in which public healthcare worker standards have traditionally been set by the states and not the federal government. We would think and urge that a physician’s possession of a state medical license or, as suggested below, unqualified eligibility to obtain such a license would be the standard which needs to be satisfied for HHS waiver purposes. The states have the substantive and historic capability of judging physician practice standards in response to community needs, and it is absolutely unwarranted for HHS as a federal agency to usurp this essential state function.

Furthermore, over the course of the physician’s training and subsequent licensure application, the physician has been tested and re-tested for substantive practice knowledge and ethical conduct. The current HHS Interim Final Rule properly recognizes the need for American Board Eligibility or Certification in the specific practice area which presumably ensures adequate professional practice standards.

However, the “outstanding ability above the norm” standard appearing in the Interim Final Rule does not seem to advance the caliber of the program or even to provide a realistic or appropriate standard.

STATE LICENSURE REQUIREMENT

The Interim Final Rule at § 50.3(d)(2) conditions the approval of an HHS waiver recommendation on the physician’s possession of a state medical license. We do not think that this precise formulation of the licensure requirement is fully appropriate or that it serves the Department’s interests in ensuring the practice capabilities of a physician applicant.

We agree that the physician has the burden of establishing that he or she will possess the authorization to perform the duties of the position at the time that the employment actually commences. In many but not all instances, this authorization will be established by presentation of the license in the state of intended practice.

However, there are state jurisdictions which do not issue medical licenses until the physician has attained H-1B status, and other states condition the issuance of the license upon fulfillment of certain ministerial actions. Furthermore, many states, while acknowledging that a physician is fully license eligible, require substantial periods of time to actually issue the state medical license.

Therefore, we would suggest that HHS revise its policy somewhat in this regard. While the physician beneficiary would still bear the burden of establishing an ability to perform the duties of the position fully by the commencement date of employment, the applicant could meet this burden by producing a state medical license (either temporary or permanent) or equivalent documentation which would establish that licensure will be issued timely to the commencement date of employment.

We would parenthetically note that the INS in its H-1B adjudication process also requires production of a state medical license or confirmation that the beneficiary will possess the authorization to perform the duties of the position, which should provide HHS with another level of assurance that a recipient of an HHS waiver recommendation will not later be found to be in violation of any state licensing provision.

CHANGES IN EMPLOYMENT SITE

The Regulations require that any proposed change in the employment site receive the approval of HHS, as well as comply with all applicable INS and Department of Labor standards. The Regulations at § 50.3(d)(4) then vest in HHS the right to approve the assignment upon a full consideration of the needs in the current and prospective communities.

We believe that this provision violates the statutory provisions of INA § 214(I)(1)(C)(ii) for the following two reasons:

- The Statute states that a physician beneficiary of a waiver can change employment sites within the three-year H-1B service requirement only upon a showing of extenuating circumstances as well as relocation to another medically underserved community. We think that the term "extenuating circumstances" is a legal standard indicating a situation in which it is simply unfeasible and/or contrary to public policy to sanction a continuation of the employment relationship. The HHS standard does not create the same rigorous standard and its focus seems to be unduly on community impact rather than on a broader consideration of the balanced rights and responsibilities of the alien physician, the healthcare provider, and the community which are implicit in the Statute.
- Under the Statute, it is the INS which has the authority to determine the existence of "extenuating circumstances", and not the recommending IGA. The Statute specifically states that the Attorney General has the authority to determine the existence of extenuating circumstances.

We think that HHS by right should be consulted in instances in which changes are proposed to a physician's place of employment. HHS can serve as an advisory body to INS. However, we do not believe that HHS can articulate standards which deviate from the statutory standards nor do we believe that HHS or any other IGA has the

right to insist upon approving any proposed change in employment, as such a measure is ultra vires.

COMPOSITION OF THE WAIVER REVIEW BOARD

Largely as a point of inquiry as well as concern, we note that the Waiver Review Board is empowered to adjudicate waiver requests, as well as to define the general parameters and numerical limits of the HHS waiver program.

Over the years, AILA practitioners have actively interfaced with the Waiver Review Board in J-1 waiver applications largely on behalf of academic medical institutions for physicians possessing outstanding research qualifications and who are doing work of national and international significance. Conversely, the Board is specifically prohibited from considering physician shortage issues in making waiver determinations and it does not recognize clinical excellence for waiver adjudication purposes, but rather focuses exclusively on research commitment.

In contrast to this historic function of the Waiver Review Board, the current waiver program for underserved communities is based on certain diametrically opposed considerations—i.e., the provision of clinical service to address physician manpower shortage situations at a community level.

We would be interested in understanding the mechanism which will enable a single body to perform two rather starkly contrasting waiver functions. While we have the utmost respect for the commitment to and the capability of HHS to administer its current waiver program, we would call attention to this apparent contradiction in the basic policies of a research-oriented and a clinically-based program and the inherent tensions which will conceivably arise.

Given the broad mandate of HHS to serve the various healthcare needs of this country, we would assume that either the Waiver Review Board in its current composition would draw quite heavily upon those offices and departments of HHS concerned with physician manpower issues and the maldistribution issue as being of core concerns to the integrity of the HHS waiver program. In the alternative, we would inquire whether the Department has considered the formulation of a separate waiver review panel having a specific expertise and a recognized, defined commitment to community welfare and physician manpower issues. We would further submit that it is the role of the Department of State to balance the intrinsic benefit to a medically underserved community with the inherent objective of the J-1 Exchange Visitor Program of requiring the alien's return to the home country.

In short, we again strongly urge HHS to serve as a forceful advocate in the public interest for this initiative as intended to facilitate the relocation of physicians to designated communities in need.

CONCLUSION

AILA again commends the Department of Health and Human Services for filling the void left by the termination of the USDA and HUD waiver programs. The needs served by those programs have not gone away and, hopefully, the new HHS program will provide much needed relief to millions of Americans lacking access to primary health care.

We appreciate this opportunity to comment on the issuance by HHS of its Interim Final Rule. We believe that this waiver initiative is part of a broader national initiative to better provide for healthcare coverage in designated medically underserved areas, and certainly believe that HHS should take an active role in this effort. We again urge that HHS serve as a forceful, proactive advocate in its administration of its waiver program, and that it energetically seek to facilitate in the public interest the relocation to designated, medically underserved communities of a promising, available source of physicians represented by International Medical Graduates.

Respectfully submitted,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

15. GUEST ARTICLE: UNITED STATES TAXATION OF RESIDENT AND
NONRESIDENT ALIENS – PART 1: RESIDENT OR NONRESIDENT
INDIVIDUALS

By Stephen Weiser

Stephen Weiser is a tax lawyer with a practicing focusing on issues relating to foreign nationals. His contact information and information on his practice can be found on his web site at www.lw-law.com.

The United States is exceptional among developed countries in that it taxes its citizens on their worldwide income, even if its citizens are living abroad and have no other ties to the U.S. Similarly, the U.S. also taxes immigrants, whether naturalized citizens or not, on their worldwide income (with limited exceptions), regardless of where such income is earned. Many other countries, particularly those in Europe, limit the taxation of income earned by their citizens and resident aliens only to income derived from sources within the country. This territorial system of taxation differs in many ways from the U.S. worldwide system of taxation.

Since many immigrants and temporary visa holders are unfamiliar with the U.S. worldwide system of taxation, and may not be aware of their obligations and responsibilities with respect to U.S. taxes, this column will review the U.S. tax laws as they apply to such individuals. An analysis of the U.S. tax laws would require much more time and space than a single article can provide. Therefore, each month we will focus on a different aspect of the U.S. tax laws as they may apply to immigrants and temporary visa holders. We begin with a review of the various tests for determining whether a non-citizen physically present in the U.S. is a "resident alien" or "nonresident alien" under the U.S. tax laws.

As stated above, the U.S. subjects its resident alien individuals to taxation on their worldwide income. This contrasts sharply with nonresident aliens, who are only subject to taxation on certain types of income earned from sources within the United States. Resident and nonresident aliens are also subject to two different methods of taxation. Resident aliens pay tax on a "net basis," meaning that such individuals are entitled to certain deductions from income in determining their tax liabilities.

Nonresident aliens are generally subject to taxation on a "gross basis," whereby the gross amount of income from sources within the U.S., not effectively connected with a U.S. trade or business, is subject to a flat 30% rate of tax.

Under the Internal Revenue Code of the U.S., an immigrant or temporary visa holder is classified as a resident alien if he or she meets (i) the *lawful permanent resident test*, (ii) the *substantial presence test* or (iii) such alien elects to be treated as a resident. The lawful residence test is fairly straightforward in its application; an individual satisfies this test if such individual has been lawfully accorded the privilege of residing permanently in the U.S. as an immigrant and such status has not been revoked. In other words, the lawful permanent residence is satisfied if an immigrant has obtained a green card (hence, this test is also known as the "green card test").

Substantial Presence Test

The substantial presence test is a bit more complicated in application. A temporary visa holder is treated as a resident alien if such individual is present in the U.S. (i) for at least 31 days during the current year, and (ii) for a total of 183 "adjusted" days during the current and two preceding calendar years. For purposes of applying the 183-day test, a day of presence in the U.S. during the current year counts as a full day; a day of presence in the preceding year counts as $1/3^{\text{rd}}$ of a day; and, a day of presence in the second preceding year counts as $1/6^{\text{th}}$ of a day. This can best be summarized through the following example:

X, an alien individual, is present in the U.S. for 122 days during 2000, 122 days during 2001, and 122 days during 2002. X was not a permanent lawful resident of the U.S. during any of those years and was not present in the U.S. in any year prior to 2000.

X is not a resident for 2000 because X is present on only 122 days during that year and the preceding two years. X is not a resident for 2001 because the total period of residence for 2000 and 2001 is $162 \frac{2}{3}$ days (122 days in 2001, and $40 \frac{2}{3}$ days in 2000). X is a resident for 2002 because she was present in the U.S. for at least 31 days in 2002, and was in the U.S. for 183 days during 2002 and the preceding two years (122 full days in 2002, $40 \frac{2}{3}$ days in 2001, and $20 \frac{1}{3}$ days in 2000).

For purposes of counting days an individual is considered present in the U.S. if that individual is physically located in the U.S. at any time during that day, no matter how brief in time. Additionally, fractions of days that result from multiplying days of presence in the first or second preceding years by $1/3^{\text{rd}}$ and $1/6^{\text{th}}$ are not rounded up to one. Finally, the U.S. includes territorial waters and air space above the U.S. for purposes of applying this test.

Substantial Presence Test – Closer Connection Exception

An individual satisfying the substantial presence test, may nevertheless, be treated as a nonresident if three conditions are met. First, the individual must be present in the U.S. for less than 183 days during the current year. Second, the individual must maintain a tax home in a foreign (non-U.S.) country during the current calendar year. Third, the individual must have a closer connection to the

foreign country in which the tax home is maintained than to the U.S. This “closer connection exception” is not available to an individual who has an application pending for adjustment of status during the current year, or has applied for permanent resident status during the year.

A “tax home” must be in existence for the entire calendar year for which the closer connection is claimed. An individual’s tax home is generally considered to be located at the individual’s regular or principal place of business, or if none, the individual’s regular place of abode. Additional facts and circumstances that tend to indicate a closer connection with another country include the location of a permanent home (such as a house or apartment), location of family, location of social, cultural or religious organizations, and the country of residence designated by the individual on forms and documents. Because of the subjective nature of the closer connection exception it is not recommended that this exception be relied upon to avoid U.S. residence status, if possible. Nevertheless, those individuals claiming a closer connection with another country should file Form 8840 with the Internal Revenue Service (Philadelphia Service Center).

Substantial Presence Test – Exempt Individuals

Special rules exclude certain days of presence from the substantial presence test. Most notably excluded are days on which an individual is present as an “exempt individual.” Exempt individuals include those present in the U.S. as foreign government-related individuals, certain teachers, trainees or students, and professional athletes temporarily in the U.S. to compete in charitable sporting events. To verify exempt individual status Form 8843 should be filed with the Internal Revenue Service (Philadelphia Service Center).

A foreign government-related individual is someone present in the U.S. (1) due to his or her diplomatic status; (2) by reason of a visa representing full-time diplomatic or consular status; or (3) as a full-time employee of any public international organization that the President of the United States has designated as being entitled to enjoy certain privileges. Immediate family members of foreign government-related individuals are also treated as foreign government-related individuals.

A teachers, trainee or student is an individual admitted temporarily in the U.S. as a nonimmigrant under specified provisions of the Immigration and Naturalization Act, more particularly, “F,” “J,” “M,” and “Q” visa holders. The individual must substantially comply with the terms of such visas. Failure to comply with the terms of these visas, or engaging in activities considered prohibited by the Immigration and Naturalization Act can result in the loss of exempt individual status. Furthermore, the Internal Revenue Service has been granted the power to make an independent assessment as to whether an individual has complied with the terms of the individual’s visa. Unauthorized employment or not being engaged in a course of full-time study may be treated by as a failure to comply with the individual’s visa requirements even if the Immigration and Naturalization Service has not sought to revoke the individual’s visa. Family members of individuals qualifying as teachers, trainees and students temporarily present in the U.S. are themselves treated as teachers, trainees and students.

An individual may not exclude days of presence as an exempt teacher or trainee if the individual has been exempt as a teacher, trainee or student for any

part of two of the prior six calendar years. In the case of a temporary "F," "J" or "Q" visa-holder whose compensation is paid by a foreign employer, the preceding sentence is modified by providing that the individual may not exclude days of presence if the individual has been exempt as a teacher, trainee or student for any part of four of the prior six calendar years.

Y is temporarily present in the U.S. during the calendar year as a teacher. Y holds a "J" visa, and has not received compensation from a foreign employer. Y was treated as an exempt student for two of the prior six calendar years. Even if this is the first year that Y seeks exempt individual status as a teacher, Y will not be an exempt individual because Y was exempt as a student for at least two of the prior six years.

Finally, an individual cannot exclude days of presence as an exempt student if the individual has been exempt as a teacher, trainee or student for any part of more than five calendar years, unless the approval of the Internal Revenue Service is obtained.

Substantial Presence Test – Exempt days

Certain additional days are excluded from any calculations under the substantial presence test. These include days during which an individual is prevented from leaving the U.S. due to a medical condition, days on which a regular commuter residing in Canada or Mexico commutes to and from employment in the U.S., days on which an individual is in transit between two points outside the U.S., and days on which an individual is temporarily present in the U.S. as a regular member of a crew of a foreign vessel engaged in transportation between the U.S. and a foreign country.

Z, a Canadian citizen, owns a residence in Toronto. On January 1, 2002, Z begins working in Niagara Falls, New York, commuting from home to his place of employment six days a week. Although X is physically present in the U.S. approximately 300 days during 2002, none of these days apply in calculating whether the substantial presence test is met. Z is not a resident for U.S. income tax purposes.

A regular commute exists if the individual must travel from her residence to the place of employment more than 80% of the workdays in the current year. A "commute" is defined as travel to and from employment within a twenty-four hour period.

An individual is treated as not being present in the U.S. if such individual is present in the U.S. for less than twenty-four hours and is transit between two points outside the U.S. "In transit" includes activities related to completing travel to another location. If an individual attends a business meeting while in the U.S. the day is no longer exempt. Similarly, a day present in the U.S. as a member of

a vessel engaged in transportation is not an exempt day if such individual conducts business in the U.S. on such day.

Election To Be Treated As A Resident

If an individual fails both the "green card" and substantial presence tests, the individual can make an election to be treated as a resident. To qualify for the election the individual must not have been a resident during the prior calendar year and *must* be a resident under the substantial presence test for the following calendar year. The individual must also meet several minimum presence tests during the year of election as well.

Manipulation of Residency Rules

The Internal Revenue Code contains a provision prohibiting individuals from manipulating the residency rules so that residency status freely changes from year to year. Special tax rules apply if the following three conditions are satisfied: (1) the individual meets the green card test, the substantial presence test, or an election is made to be treated as a resident for at least three consecutive calendar years; (2) the individual then becomes a nonresident; and (3) the individual then becomes a resident before the end of the third year after the initial residency period terminated.

If residency status changes during a year the individual effectively has two tax years, one as a nonresident and one as a resident. If an individual acquires a green card during a year (but does not meet the substantial presence test) resident status begins on the first day of U.S. presence as a lawful permanent resident. Similarly, if the substantial presence test is met, residency generally begins on the first day of U.S. presence. In the case of an individual making the election to be treated as a resident, the residency starting date is the first day of the calendar year of which the individual is treated as a resident.

Planning Considerations

If an individual expects to become a U.S. resident, the individual may consider accelerating the recognition of income if the effective rate of the foreign tax is less than the rate imposed by the U.S. In particular, consider recognizing taxable gains if the foreign jurisdiction does not impose a tax on capital gains. Such individuals should also consider restructuring their foreign business and asset holdings to avoid subjecting any income earned thereon to U.S. income taxes. The reverse strategies should be considered if an individual is giving up U.S. residency status.

Application of Tax Treaties

If a temporary visa holder or immigrant is treated as a U.S. resident and is also treated, pursuant to a tax treaty between the U.S. and a foreign country, as a resident of that foreign country, the residency rules contained in that treaty apply. These treaties contain several "tie-breaking" provisions that determine which jurisdiction has primary taxing authority over the individual (in other words, these provisions provide rules for determining the one and only jurisdiction of which the individual is considered a resident). If the individual is determined to be a resident of the foreign country for treaty purposes, and the individual claims the benefits of that treaty, the individual is treated as a nonresident of the U.S. for income tax purposes. Some treaties also contain special rules governing the residency of certain qualifying individuals (e.g., athletes).

In summary, residency status under the U.S. tax laws is important for purposes of determining the extent to which those laws apply to an individual. U.S. citizens and residents are subject to U.S. income taxes on their worldwide income. U.S. nonresidents are only subject to U.S. income taxation on income derived from U.S. sources that are not connected with a U.S. trade or business. Noncitizens holding a green card are treated as residents of the U.S. (unless treaty benefits are claimed), while those physically present in the U.S. for at least 183 days over the current and prior two years (with at least 31 days of presence occurring during the current year) are also treated as residents unless one of several exceptions apply. The first exception applies for those individuals with a "closer connection" to another country. Other exceptions allow certain "exempt individuals" to exclude certain days of presence from determining whether the 183 day test is satisfied, or to exclude certain exempt days for presence due to medical conditions, commuting between Canada or Mexico and employment within the U.S., or days in transit between points outside the U.S. Lastly, an alien individual may elect to be treated as a resident provided certain conditions are satisfied.

16. LEGISLATIVE UPDATE

The House of Representatives has named the 50 members of the new Homeland Security Committee. This committee will oversee the new Department of Homeland Security. What is not clear is whether this committee will take over the functions of the House's Immigration Subcommittee which is part of the House Justice Committee. The responsibility for the American immigration system is being transferred this year from the Department of Justice to the Department of Homeland Security.

The Committee is chaired by Christopher Cox (R-CA) and the ranking Democrat on the committee is Jim Turner (D-TX).

Republican members of the committee include the following: Bill Young (FL), David Dreier (CA), Don Young (AK), Duncan Hunter (CA), James Sensenbrenner (WI), Bob Goodlatte (VA), Sherwood Boehlert (NY), Billy Tauzin (LA), Christopher Shays (CT), Curt Weldon (PA), Dave Camp (MI), Ernest Istook (OK), Harold Rogers (KY), Jennifer Dunn (WA), Jim Gibbons (NV), John Linder (GA), John Shadegg (AZ), John Sweeney (NY), Kay Granger (TX), Lamar Smith (TX), Lincoln Diaz-Balart (FL), Mac Thornberry (TX), Mark Souder (IN), Pete Sessions (TX), Peter King (NY), and Porter Goss (FL).

Democratic Representatives on the committee are Robert Andrews (NJ), Benjamin Cardin (MD), Peter DeFazio (OR), Norman Dicks (WA), Bob Etheridge (NC), Barney Frank (MA), Charles Gonzalez (TX), Jane Harman (CA), Sheila Jackson Lee (TX), James Langevin (RI), Zoe Lofgren (CA), Nita Lowey (NY), Ken Lucas (KY), Edward Markey (MA), Karen McCarthy (MO), Kendrick Meek (FL), Bill Pascrell (NJ), Loretta Sanchez (CA), Louise Slaughter (NY), Bennie Thompson (MS), and Dels. Donna Christensen (VI) and Eleanor Holmes Norton (DC).

Three members of the House of Representatives have sent a letter to Attorney General John Ashcroft expressing disappointment that the Department of Justice has been working on a successor bill to the "USA Patriot Act" without the input of the House's Judiciary Committee. The letter writers are Democrats John Conyers, Jr., Robert C. Scott and Sheila Jackson Lee. Representative Lee is the ranking Democrat on the House Immigration Subcommittee.

House Immigration Subcommittee member Elton Gallegly (R-CA) has announced plans to introduce legislation this month directing that "no foreign-issued identification other than a passport would be acknowledged by the federal government as valid identification." State and local agencies as well as private companies would not be affected. Gallegly is particularly concerned by several local and state agencies announcing that they will accept the matricula consular, an identification card issued to Mexicans by the Mexican Foreign Ministry.

Several states, including Arizona and Colorado, are debating the issue of allowing use of the card as a form of identification.

To view our legislative chart, visit www.visalaw.com/advocacy.html